

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, et al.

Plaintiffs,

v.

TYSON FOODS, INC., et al.

Defendants.

Case No. 4:05-cv-00329-GKF-SAJ

REPLY ON DEFENDANTS' MOTION TO CERTIFY QUESTIONS OF LAW

Defendants' Motion for Judgment as a Matter of Law in Light of Plaintiff's Constitutional Violations ("Constitutional Motion") (Dkt. No. 1064) raises several significant questions about the legality of the State's contingency fee contract. These questions primarily address the meaning of Oklahoma's constitution and statutes, which: (1) require public servants to exercise the State's power free from considerations of personal profit; (2) reserve exclusively to the legislature the power to expend state funds; and (3) prohibit State contracts that expend money in future fiscal years.

At oral argument on Defendants' Constitutional Motion, this Court suggested it would be prudent and advisable to certify these questions to the Oklahoma Supreme Court while the remaining litigation proceeds. Defendants agree that certification is appropriate because the Oklahoma Supreme Court should be the final arbiter of state law, especially state constitutional law. Moreover, certification would impose no additional burden on the parties because these issues must be briefed and decided before an appellate court either now or at the conclusion of the case. As the Court noted at oral argument, "the issue isn't going to go away." Mot. Hr'g Tr. 128:11, June 15, 2007. Thus, certification will preserve judicial resources by avoiding an appeal on whether the State's prosecution of the case violated the state constitution.

The State opposes certifying these issues to the Oklahoma Supreme Court because (1) this Court has ruled already on Defendants' Constitutional Motion and the issues are not subject to reasonable doubt; (2) questions of state law cannot be certified unless both parties agree to certification; and (3) certification would require the State to perform work that could otherwise be avoided. Each of these arguments is incorrect.

I. Defendants’ Constitutional Motion Presents Significant and Unresolved Questions of Oklahoma State Law

The State’s principal argument is that this Court has conclusively resolved the issues raised in Defendants’ Constitutional Motion and the answers to these questions are not subject to reasonable debate. *See* State of Oklahoma’s Response in Opposition to “Defendants’ Motion to Certify Questions of Law” (Dkt. No. 1231) (“Resp.”) at 3-4. The Court’s statements at oral argument contradict the State’s assertion. *See, e.g.*, Mot. Hr’g Tr. 93:8-24, June 15, 2007. The Court recognized that the issues presented are important and complex. Indeed, the questions raised in Defendants’ Constitutional Motion address the most fundamental issues of justice. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-78, 2 L. Ed. 60 (1803) (noting that the meaning of the constitution’s text is of paramount importance and must not be ignored or supplanted by the act of government officers without judicial review); *Russell Petroleum Co. v. Walker*, 19 P.2d 582, 588 (Okla. 1933) (“The [Oklahoma] Constitution, and not an order of the chief executive, is the supreme law of Oklahoma.”).

The principle that due process requires impartiality from those who exercise the state’s power is unquestioned in American legal jurisprudence. *See, e.g., Young v. United States*, 481 U.S. 787, 814 (1987) (“[W]e must have assurance that those who would wield [the state’s] power will be guided solely by their sense of public responsibility for the attainment of justice.”); *Berger v. United States*, 295 U.S. 78, 88 (1935) (stating that a government attorney “is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore . . . is not that it shall win a case, but that justice shall be done”).

The unresolved question in this case is whether this due process principle bars the State's contingency fee arrangement. Other courts have held that similar contingency fee agreements violate due process. *See, e.g., People ex rel. Clancy v. Superior Court*, 705 P.2d 347, 351-53 (Cal. 1985); *County of Santa Clara v. Atlantic Richfield Co.*, Case No. 1-00-CV-788657 (Cal. Sup. Ct. Apr. 4, 2007) (Order Regarding Defendants' Motion To Bar Payment Of Contingent Fees To Private Attorneys). While the State has cited some courts that have not found that certain contingency fee arrangements violate the principle of impartiality, *see* State of Oklahoma's Response to Defendants' "Motion for Judgment as a Matter of Law in Light of Plaintiff's Constitutional Violations" (Dkt. No. 1085) at 15-16, this split of authority compels the resolution of this issue by the Oklahoma Supreme Court, particularly because, as this Court noted, no Oklahoma court has addressed the issue. Indeed, the Court noted the lack of Oklahoma precedent as a reason for certification to the Oklahoma Supreme Court. *See* Mot. Hr'g Tr. 93:8-13, June 15, 2007 (THE COURT: "Given that there is no *Clancy* in Oklahoma and because it's clear that this matter will go on for some time even if we proceed at all deliberate speed, what of certifying a question to the Oklahoma Supreme Court to certify these issues that are framed in this motion?"). The State's claim that these issues are insignificant and unworthy of the State's time and attention is baseless.

The application of the Oklahoma Constitution's separation-of-powers provisions in this case is equally weighty and unresolved. The parties agree that the Oklahoma Constitution vests the state legislature with exclusive power over the state treasury. *See* Okla. Const., art. V, § 55. Article V, § 55, is a self-executing prohibition against payment of any money from the state treasury, "except in pursuance of an appropriation

by law.” *Morgan v. Daxon*, 49 P.3d 687, 698 (Okla. 2001). “An appropriation is an authority from the Legislature, given at the proper time and in legal form to the proper officers, to apply a distinctly specified sum out of a designated fund in the treasury in a given year to a specified object or demand against the state.” *Menefee v. Askew*, 107 P. 159, 161 (Okla. 1910). Oklahoma courts have emphasized that “it is apparent that the sovereign people who framed the Constitution intended to keep a firm hand on the public purse strings, by limiting the power to spend money without an appropriation.” *Ex Parte Pope*, 242 P. 290, 294 (Okla. Crim. App. 1925). That “firm hand” belongs to the Oklahoma legislature.

The Attorney General does not claim he has a legislative appropriation to fund his contingency fee arrangement. At oral argument, the Attorney General admitted that the funds held by the Attorney General are “certainly under the control of the state treasury but it is not what I would consider part of the state treasury which I consider to be the general fund or the other funds available for appropriation. We don’t have an account down at First National Bank.” *See* Mot. Hr’g Tr. 118:2-7, June 15, 2007.

Notwithstanding the Attorney General’s tortured application of the plain language of the Oklahoma constitution, the Attorney General’s judicial admissions prove the contingency fee agreement here violated Oklahoma’s separation of powers doctrine. Remarkably, the Attorney General proclaimed that his prior customs and certain state statutes exempt him from the state constitution’s prohibition on spending funds from the treasury without an appropriation. *See* Mot. Hr’g Tr. 117:5-20, June 15, 2007. Clearly, the meaning of those statutes and whether the Attorney General’s past practice override the Oklahoma Constitution are critical issues of state law.

Ironically, the current Oklahoma Attorney General has issued several opinions emphasizing the state legislature's exclusive power over the treasury, opinions that are at war with this current position. According to the Attorney General, "[i]t is conceded that the control of the fiscal affairs of the state is a legislative function and that the power of the Legislature in the exercise of such control is plenary, subject only to constitutional restrictions, and the power of the people to legislate by means of the initiative and referendum." Okla. Att'y Gen. Op. No. 01-52, *3 (2001) (*quoting Boswell v. State*, 74 P.2d 940, 942 (Okla. 1937)). No other state officer can decide how to allocate the State's resources because, according to Attorney General Edmondson, "Article V, § 55 [of the Oklahoma Constitution] vests the function of appropriating public funds exclusively in the Legislature." Okla. Att'y Gen. Op. No. 00-47, *2 (2000). This exclusive power over fiscal affairs cannot be avoided by simply placing the funds in different accounts. "A constitutional process strictly controls State expenditures. First, '[n]o money shall ever be paid out of the treasury of this State, nor any of its funds, nor any of its funds under its management, except in pursuance of an appropriation by law[.]' Okla. Const. art. V, § 55. An agency may not spend money without this legislative appropriation." Okla. Att'y Gen. Op. No. 00-33, *2 (2000) (citing *Sand Springs v. Dep't of Pub. Welfare*, 608 P.2d 1139, 1149 (Okla. 1980)).

Finally, at oral argument the Attorney General offered no authority to explain how he could lawfully enter into a contract that commits him to pay funds to contingency fee lawyers in future fiscal years. The Attorney General argues that any funds he receives in this case will not come from the state treasury. The Oklahoma Constitution explicitly anticipates and rejects such semantics when it declares that "[t]he state shall

never create or authorize the creation of any debt or obligation, or fund or pay any deficit, against the state, or any department, institution or agency thereof, regardless of its form or the source of money from which it is to be paid,” except through the constitutionally-enumerated annual appropriation process. Okla. Const., art. X, § 23. The open-ended contingency fee agreement entered into by the Oklahoma Attorney General and his private attorneys has already stretched the State’s fiscal obligations over multiple years in clear violation of the plain text of the constitution. Such a contract cannot be constitutional, “regardless of its form or the source of money from which it is to be paid.” *Id.*

Several prior Oklahoma attorneys general have issued opinions that multi-year contracts (such as the contingency fee contract in this case) are unconstitutional regardless whether the funds to be paid out of the contract are drawn from the treasury. *See, e.g.*, Okla. Att’y Gen. Op. Nos. 04-18 (2004); 84-83 (1985); 80-114 (1980); 79-276 (1979); 79-138 (1979); 79-99 (1979); 79-85 (1979); 78-256 (1978); 76-365 (1976) (each opining and citing authority for the constitutional rule that no state agency or officer may enter into contracts (1) that bind the State to expend funds in future fiscal years regardless of the funds’ sources or (2) where the amount of the State’s liability may not be reasonably estimated to be within the current year’s appropriation).

Given the importance of these constitutional issues, it is remarkable that the State labels the issues as merely “tangential to the central issue in this case.” Resp. at 4. Whether the Attorney General is complying with the Oklahoma Constitution in prosecuting this action is central to the case. The Attorney General cannot set up an unconstitutional procedure and then complain when the defendants object. The

Oklahoma Attorney General also cannot avoid the plain language of the Oklahoma Constitution's separation-of-powers provisions because he has made a custom of doing so and no one has complained until now.

II. Agreement Between The Parties Is Not Required For Certification

Oklahoma asserts that certification of any state law questions to the Oklahoma Supreme Court requires its consent. Resp. at 2. Because the State refuses to consent, it claims certification is inappropriate. *Id.* While the Court noted that it would “certainly” certify these questions to the Oklahoma Supreme Court if the parties agreed, consent of one or both parties is not relevant to whether a question should be certified. Mot. Hr'g Tr., 128:20-21, June 15, 2007.

As discussed in Defendants' Motion to Certify, federal courts examine a number of factors when considering whether to certify questions of state law. Consent of one or both of the parties is not a factor. Courts consider whether certification will serve principles of federalism by respecting the roles of state courts—the final arbiters of the meaning of their state's laws. *See, e.g., United States v. DeGasso*, 369 F.3d 1139, 1145 (10th Cir. 2004) (citing *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)); *Fisher v. Civil Service Comm'n of Salt Lake City, Utah*, 484 F.2d 1099, 1100 (10th Cir. 1973); *Garcia v. Fed. Ins. Co.*, 473 F.3d 1131, 1136 (11th Cir. 2006) (“When significant doubt exists about the answer to a material state law question upon which the case turns, a federal court should certify that question to the state supreme court in order to avoid unnecessary speculation.”); *Reagan v. Racal Mortg., Inc.*, 135 F.3d 37, 44 (1st Cir. 1998) (“[W]hen meaning of a state law depends on the decision maker's ability to discern the state legislature's intent from an array of mixed signals, considerations of federalism, comity, and practicality suggest that the state's highest tribunal is best positioned to an informed

and authoritative judgment.”); *Knowles v. United States*, 29 F.3d 1261, 1265 (8th Cir. 1994) (“A proper deference to the authority of the Supreme Court of South Dakota counsels us to leave it to that Court to make that determination before we decide how to apply the statute in this instance.”). This factor is particularly compelling where, as here, “the state supreme court has yet to have an opportunity to illuminate a clear path on the issue.” *State Farm Mut. Auto Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001).

Courts also consider whether certification has the potential to preserve both the litigants’ and the court’s resources by avoiding unnecessary proceedings and potential re-trials that could result from incorrect interpretations of state law. *See Delta Funding Corp. v. Harris*, 466 F.3d 273, 273 n.1 (3d Cir. 2006) (“The certified question procedure is a useful vehicle for federal courts to give the state supreme courts an opportunity to elucidate an important issue of state law, thereby avoiding erroneous predictions that will confuse rather than clarify the issue.”).

Finally, courts consider whether the issues to be certified are “matter[s] of vital public concern” or “will likely recur in other cases.” *State Farm*, 275 F.3d at 672. Although any one of these factors would be sufficient to support a decision to certify, all of these factors support certification in this case.

III. Certification Will Not Unduly Burden The State

The State argues that it will be inconvenienced if the Court certifies Defendants’ state constitutional questions to the Oklahoma Supreme Court. Resp. at 4. In particular, the State claims that certification would increase its briefing requirements, forcing the unnecessary expenditure of its time, energy and resources. *Id.*

This argument is absurd. The State will be required to brief these issues to an appellate court at some point. The only question is whether the issues will be briefed to

the Oklahoma Supreme Court in order to avoid a potential re-trial and to ensure compliance with the constitution throughout this case. The State prefers to wait until after trial and allow the Tenth Circuit (or Oklahoma Supreme Court if the Tenth Circuit elects to certify these questions) to decide the constitutionality of the State's prosecution of this case. Simply put, the State's request to postpone briefing would not serve judicial economy and would result in wasted time and resources if the case were remanded based on these avoidable constitutional violations.

The State's protest is difficult to credit given the significance of these constitutional issues to the public and the State's staffing of this case. The former Attorney General of Nebraska recently opined that the due process and separation-of-power issues created by state contingency fee contracts are of the gravest public import. *See* Don Stenberg, *States Disserve the Public Interest When Hiring Contingent Fee Lawyers*, 18 Washington Legal Foundation Legal Backgrounder, No. 24, at 4 (2003) (highlighting the magnitude of the constitutional issues implicated by contingency fee agreements between attorney generals and private attorneys and noting their resulting negative impact on the public interest).

Moreover, the docket sheet reveals that the State has at least 20 attorneys currently working on this case, of whom more than 15 are private lawyers working on a contingent fee basis. Surely the State could assign one of these lawyers to address these vital issues of public concern.

IV. This Court's Ability to Certify Federal-Law Issues to the Tenth Circuit Does Not Impact Its Ability to Certify State-Law Issues to the Oklahoma Supreme Court

The state opposes certifying issues of federal law to the Tenth Circuit on interlocutory appeal while issues of state law are pending before the Oklahoma Supreme Court., *See* Resp. at 5-6. As the state's brief concedes, however, this Court has ample discretion to certify federal issues to the Tenth Circuit. *See* 28 U.S.C. § 1292(b); *cf.* Resp. at 5-6 (“exceptional circumstances will justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.”) (quoting *Fed. Trade Comm'n v. Skybiz.com, Inc.*, 2001 WL 1673630, *1 (N.D. Okla. Oct. 22, 2001)). Whether the contingency fee contract violates federal due process is a question worthy of interlocutory certification. *See* Dkt. No. 1217 at 7-8. However, whether this Court elects to certify issues of federal law for interlocutory appeal has no bearing on the Court's ability to certify issues of state law to the Oklahoma Supreme Court. Indeed, the distinction between certification of state law issues and the appeal of federal issues demonstrates the need for certification to the Oklahoma Supreme Court. The federal issues raised in this case will be appealed to the Tenth Circuit in the regular course of litigation. In contrast, the Oklahoma Supreme Court will not have an opportunity to resolve these critical issues of state law unless the federal courts certify the issues for the Oklahoma Supreme Court's review. The Attorney General has provided no compelling reason why this Court should deny the Oklahoma Supreme Court that opportunity.

IV. Conclusion

For the foregoing reasons and the reasons set forth in Defendants' Motion to Certify Questions of Law, Defendants respectfully request that the Court grant their Motion to Certify.

Dated: August 22, 2007 Respectfully submitted,

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